STATE OF CONNECTICUT

APPELLATE COURT

A.C. 42493

JUDITH KISSEL

vs.

CENTER FOR WOMEN'S HEALTH, P.C., ET AL.

BRIEF OF DEFENDANT-APPELLEE REED WANG

TO BE ARGUED BY:

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Filed: July 19, 2019

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INTRODUCTION

The Plaintiff was injured when a heat lamp used during an acupuncture session fell onto her foot, causing severe injury. She sued the acupuncturist and the health-care center for medical malpractice and the lamp manufacturer for product liability, obtaining a one-million-dollar verdict.

For more than three decades, General Statutes § 52-190a has required that plaintiffs suing for medical malpractice attach a written opinion from a similar health-care provider explaining that there appears to be evidence of malpractice and the health-care provider's basis for that conclusion. The failure to do so implicates personal jurisdiction and subjects non-complying actions to dismissal on a proper motion. The Plaintiff here failed to do so, and the malpractice Defendants moved to dismiss.

In response, the Plaintiff filed an amended complaint with an opinion letter, claiming that it had been inadvertently omitted. At that point, the statute of limitations had passed. Nevertheless, the trial court permitted the amendment and denied the motions to dismiss. In light of *Peters v. United Community & Family Services, Inc.*, 182 Conn. App. 688 (2018), this was error. Moreover, the trial court also refused to hold an evidentiary hearing on the jurisdictional facts even though the Defendants sought one. This too was error. See, e.g., *Caron v. Connecticut Pathology Group, P.C.*, 187 Conn. App. 555, 563 n.6, cert. denied, 331 Conn. 922 cert. denied, 331 Conn. 22 (2019).

But even if the Plaintiff had properly complied with § 52-190a, she failed to prove that any purported breach of the standard of care caused her injuries. Specifically, no expert witness testified that had the acupuncturist inspected the lamp immediately prior to using it on the Plaintiff, he would have known that the lamp would lower onto her foot. This evidentiary lacuna required a directed verdict. Even if sufficient evidence had existed, the trial court erroneously instructed the jury that expert testimony was not necessary if laypersons could discern causation, thereby assigning to the jury a question of law that belongs to the court.

For these reasons, Dr. Wang supports the Center for Women's Health in this appeal.

STATEMENT OF FACTS AND PROCEEDINGS

The Plaintiff, Judith Kissel, brought this action against the Center for Women's Health, P.C. (Center) and Reed Wang for medical malpractice by complaint dated March 30, 2012, and returnable on April 24, 2012. (Compl.; App. at A18.) The Plaintiff claimed that on April 22, 2010, a heat lamp used during an acupuncture session came in contact with her toe, causing severe injury. (*Id.* at 1-2; App. at A18-A19.)

Both Defendants moved to dismiss because the Plaintiff failed to comply with the requirements of General Statutes § 52-190a by failing to include the requisite opinion letter from a similar health-care professional. (Center Mot. Dismiss; Wang Mot. Dismiss; App. at A26, A28.) The Plaintiff subsequently moved to amend her complaint to add an undated opinion letter and an affidavit by her counsel claiming that the opinion letter existed at the time her complaint was filed but was inadvertently omitted. (Req. to Amend Compl., 6/28/12; Aff., 6/28/12; App. at A29, A42.) The Defendants objected to the amendment, arguing, inter alia, that an evidentiary hearing was necessary to resolve the dispute over the undated opinion letter. (Obj. to Req. to Amend, 7/9/12 at 7; App. at A58.) The trial court (Karazin, J.T.R.) denied the motions to dismiss on September 6, 2012, concluding it had discretion to permit the amendment and that an evidentiary hearing was not necessary. (MOD, 9/6/12, at 8-9; App. at A67-A68.)

The Center moved to reargue, asserting, inter alia, that the court overlooked *Morgan v. Hartford Hospital*, 301 Conn. 388 (2011), which held that attaching an opinion letter was necessary for the court to obtain personal jurisdiction. (Center Mot. to Reargue, 9/18/12; Center Mem. of Law, 9/18/12; App. at A70, A231.) Wang joined the motion. (Wang Mot. to Reargue, 9/20/12; App. at A72.) The trial court (Karazin, J.T.R.) summarily denied the motions. (Order, 9/21/12; App. at A73.)

After trial, Dr. Wang and the Center sought permission to file a second motion for reconsideration of the denial of the motion to dismiss on the basis of a then-recent decision of this Court, *Peters v. United Community & Family Services, Inc.*, 182 Conn. App. 688

(2018), which held the corrective action taken after the statute of limitations had run was ineffective. (Wang Mot. for Permission, 6/26/18; Center Mot. for Perm., 9/12/18; MOD, 1/3/19 at 4; App. at A143, A144, A148.) The trial court (Povodator, J.T.R.) agreed to revisit the issue, but ultimately denied relief. (*Id.* at 10, 19-20; App. at A154, A163-A164.)

Dr. Wang brought a third-party action claiming products liability against Defendant Health Body World Supply Inc. a/k/a the WABBO Company (Wabbo), which sold the lamp at issue. (Wang Third Amended Third-Party Compl., 9/9/15; App. at A94.) He alleged, inter alia, that the lamp was defective and fell spontaneously. (*Id.* at 4; App. at A99.) The Plaintiff then brought her own complaint against Wabbo. (Pl.'s Third-Party [sic] Compl., 12/11/17; App. at A116.) Dr. Wang withdrew his third-party complaint shortly after trial started. (Withdrawal, 11/16/17; App. at A114.)

The case was tried to a jury (Povodator, J.T.R., presiding), which returned verdicts for the Plaintiff on both complaints. (Verdict, 12/19/17; App. at A132, A133.) On the medical malpractice action, the jury found Dr. Wang and the Center liable but found no liability on the Plaintiff's part for contributory negligence. (Jury Interrogs., 12/19/17, at 2-3; App. at A135-A136.) On the product liability action, the jury attributed 80% of the responsibility for the Plaintiff's injuries to Wabbo and 20% to Dr. Wang. (*Id.* at 5-6; App. at A138-A139.) The jury valued the Plaintiff's damages at $1,000,000.00. (*Id.* at 6; App. at A139.) The Defendants filed motions to set aside the verdict and for remittitur, which the trial court denied on January 3, 2019. (Wang Mot. Set Aside, 12/22/17; App. at A141; Wang Mot. Remittitur, 12/29/17 (see court file) .) Dr. Wang timely appealed.[1]

The following facts are pertinent to the resolution of this appeal. On April 22, 2010, the Plaintiff, who had been a long-time patient at the Center, went to Dr. Wang for acupuncture treatment. (MOD, 1/3/19, at 1-2; App. at A145-A146.) She had not undergone acupuncture previously. (Tr. 12/7/17 at 102; App. at A308.) After completing an intake form

[1] Dr. Wang and Wabbo have also appealed. A.C. 42469 (Dr. Wang's appeal), A.C. 42505 (Wabbo's appeal).

and meeting with Dr. Wang for approximately an hour, they proceeded to a multi-function room where Dr. Wang turned on a TDP Special Electromagnetic Health Lamp, also known as the "Miracle Lamp,"[2] (Tr. 11/28/17 at 206; Def.'s Ex. 518; App. at A235) and left the room as the Plaintiff undressed to her underwear, donned a paper gown, and lay down on a table that was either 30 or 36 inches high.[3] (Tr. 12/7/17 at 101-02; App. at A307-A308.)

The lamp was located near the foot of the table. (Tr. 11/16/17 at 166; App. at A247.) Dr. Wang testified that he set the lamp up at the beginning of the day of the Plaintiff's injury and did not move or adjust the lamp during the day.[4] (Tr. 11/29/17 at 162-63; App. at A256-A257.) He stated he had used the lamp on three patients that day prior to the Plaintiff without moving it and that the lamp "[a]lways remained stationary, secure, sturdy." (*Id.* at 162; App. at A256.) He further testified that was his usual practice because of the configuration of the room. (*Id.* at 163; App. at A257.)

Returning to the room, Dr. Wang placed acupuncture needles in various parts of the Plaintiff's body, taking about ten minutes to do so. (MOD, 1/3/19, at 2; Tr. 12/7/17 at 104; App. at A146, A310.) After placing the needles, Dr. Wang left the room for approximately five minutes, which was his standard practice. (MOD, 1/3/19, at 2; App. at A146.) The parties dispute whether the Plaintiff called out but did not receive a response from him. (*Id.*) When

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[2] The lamp purports to have numerous therapeutic effects because of minerals imbedded in the lamp head that generate electromagnetic waves. (Def.'s Ex. 518; App. at A236.) Dr. Wang used the floor model with dual heads, although he only used one lamp head at a time. (Tr. 11/16/17 at 144; Tr. 11/28/17 at 201; App. at A242, A252.)

[3] Dr. Wang testified at trial that there is no standard height for massage tables, as they are adjustable. (Tr. 11/16/17 at 161; App. at A246.) He did not testify specifically as to the height of the table. Victor Popp, the Plaintiff's expert, testified that when he tested an exemplar lamp he assumed the table was either 30 or 36 inches in height, based on what he recalled Dr. Wang had said, presumably in his deposition. (Tr. 12/1/17 at 147-48, 209; App. at A275-A276, A289.)

[4] Dr. Wang testified that the lamp was "18 inches away" and disputed that the lamp was hung over the Plaintiff's foot. (Tr. 11/15/17 at 141; Tr. 11/16/17 at 199; App. at A141, A248.) The Plaintiff played portions of Dr. Wang's testimony that, according to the Plaintiff, indicated the lamp hung over the Plaintiff's foot, although Dr. Wang continued to dispute that was the case. (Tr. 11/15/17 at 146-47 at 146-47; App. at A240a-A240b; Pl.'s Ex. 114 (see court file).) It is not clear that his deposition supports the Plaintiff's assertion.

Dr. Wang returned to the room, he discovered that the head of the heat lamp was resting on the Plaintiff's toe. (*Id.*) He and the principal of the Center took the Plaintiff to the emergency room. (*Id.*)

Two experts testified regarding the mechanics of the lamp. The Plaintiff presented Victor Popp, who is an engineer. (Tr. 12/1/17 at 19; App. at A260.) In response to a hypothetical question, Popp testified that the design defects of the lamp — i.e., the lack of a locking mechanism for the arm and lack of a guard over the lamp head — caused the Plaintiff's injury. (Tr. 12/1/17 at 100-02; App. at A262-A264.)

As to how the lamp came in contact with the Plaintiff's toe, Popp further testified that "the only plausible explanation" was that some sort of excitation or perturbation, such as someone touching it, banging into it, or applying force to it in some fashion, caused the lamp to lower. (Tr. 12/1/17 at 112-13, 141-42; see also *id.* at 162; App. at A267-A268, A269-A270.) Absent some kind of outside force, he could not explain with any certainty what happened. (*Id.* at 164; App. at A268.) Indeed, he thought that a scenario where the lamp descended onto the Plaintiff's foot without some outside force was "impossible." (*Id.*) While Popp testified that a movement of the massage table could have jiggled the lamp if the table hit it, he conceded that no one knows what force, if any, affected the lamp when Dr. Wang was out of the room. (*Id.* at 215-16; App. at A290-A291.)

Popp also testified that the arm would loosen gradually, and that the looseness would become apparent over time. (*Id.* at 173, 175; App. at A285, A287.) But, as Popp explained:

> There's no threshold where one day it suddenly drops down five inches, it starts slowly. So it can be deceptive and maybe not observable unless you're measuring with a tape measure, for example or hanging weights on it and watching to see if it moves.

(*Id.* at 175; App. at A287.) When asked whether daily inspection would reveal the wear, he stated:

> It would depend on how thorough your inspection is. You would have to inspect, not just look at the device, see if anything's loose. You'd have to move it a certain amount, measure how much you moved it and see how much it moves, if it moves. It would be a pretty complicated inspection.

(*Id.* at 176; App. at A288.) Popp indicated that one and a quarter pounds of force were necessary to set the lamp in motion. (*Id.* at 143; App. at A271.)

Popp performed certain tests in an attempt to duplicate what might have occurred when the Plaintiff was injured. (*Id.*) He testified that he based his opinions regarding the safety on tests he performed on an exemplar. (*Id.* at 159; App. at A279.) The exemplar, however, was a different make and model. (*Id.*) Popp testified at his deposition that it was irrelevant to his opinions because he "discarded most of what . . . [he] learned from the exemplar . . . ." (*Id.* at 160; App. at A280.)

Regarding the tests, Popp first performed several drop tests in which he pulled the head of the lamp, in the words of Plaintiff's counsel, "all the way up until it was just about to come off the ground" and then dropped it.[5] (*Id.* at 143; App. at A271.) This test revealed that the head of the lamp dropped nine inches. (*Id.* at 145; App. at A273.) He testified that if the clearance was 18 inches, the lamp could not have reached her foot if the table was 30 inches high and her foot was six or seven inches off the table. (*Id.* at 145-46; App. at A273-A274.) This means that, pulled all the way up, the height of the head of the lamp was 54 to 55 inches.[6]

Popp then testified that the lowest the lamp head fell was to a height of 42 inches, stating, "It dropped about 9 inches from the full height." (*Id.* at 147; App. at A275.) To explain this discrepancy (55" - 9" = 46", not 42"), he stated that he was not able to extend the lamp 18 inches but could only extend it 13 inches. (*Id.*) He indicated that 13 inches "could be true"

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[5] Popp responded, "Not like that though, but yes, similarly." (*Id.*) He indicated that he did not lift the head as aggressively as apparently Plaintiff's counsel did in asking the question, but did not dispute the height to which the head was lifted. (*Id.*)

[6] 30"+7"+18" = 55". 55"-9"=46". Thus, under those assumptions, the lamp would have been nine inches (46" - 37") above the Plaintiff's foot. If the table was 36" high, the lamp still would have been two or three inches (46" - 43") above the foot. Popp calculated the height of a foot based on his wife's foot. (*Id.* at 145; App. at A273.)

based on thirty-inch table and an eight-inch foot.[7] (*Id.*) But he did indicate that if the table was 36 inches high and the lamp 13 inches above the Plaintiff's foot, a nine-inch drop would have reached her toe. (*Id.* at 147-48; App. at A275-A276.) There was no evidence, however, that Dr. Wang pulled the head of the lamp all the way up in the manner that Popp described.

The other test Popp performed was a jiggle test in which he grabbed the lamp and jiggled it twenty times in six or seven seconds. (*Id.* at 148; App. at A.276.) He conducted four such tests but the closest the lamp head got was approximately two inches above where the Plaintiff's foot would have been, assuming that the table was 36 inches in height. (*Id.* at 149; App. at A277.) Thus, Popp's testimony could not explain how, if Dr. Wang had jiggled the lamp before the incident to test its stability, such test would have prevented the injury. In any event, there was no evidence that Dr. Wang had jiggled the lamp.

The most, therefore, that the lamp dropped was nine inches, but the only evidence was that happened when the head was pulled all the way up as occurred in the first test Popp performed. As indicated, there was no evidence that Dr. Wang pulled the head of the lamp all the way up or jiggled it prior to treating the Plaintiff. Further, while the Plaintiff asked Popp whether the design defect caused the Plaintiff's injuries, the Plaintiff never asked him whether failing to inspect the lamp before using it on the Plaintiff (as opposed to inspecting the lamp at the beginning of the day) caused the Plaintiff's injuries.

Wabbo presented the expert testimony of Glenn Vallee, a professor of mechanical engineering. (Tr. 12/7/17 at 26; App. at A296.) He had examined the lamp and found that it remained in position when configured as it had been on the day of the incident. (*Id.* at 41; App. at A297.) He also testified that the lamp would not have lowered spontaneously without some outside force. (*Id.* at 46; App. at A302.) He further testified that "an inadvertent bump or a couple of bumps would not have caused the lamp to drop over a foot." (*Id.* at 47; App. at A303.) Moving the lamp head twelve inches, according to Vallee, would require a constant

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[7] 30"+8"+13" = 51". 51"-9" = 42". Under this scenario, the lamp would only have lowered to 4" above the Plaintiff's foot (42" - 38").

force as a bump would only move the head a little bit. (*Id.* at 50; App. at A304.) He also stated any instability would develop over time and that if "all of the sudden" the lamp started dropping under its own weight, it would be noticeable to the user. (*Id.* at 54-55; App. at A305-A306.) Vallee offered no opinion on how Wang's purported breach of the standard of care caused the Plaintiff's injury.

Two experts testified as to the standard of care an acupuncturist should employ when using a heat lamp. The Plaintiff presented the testimony of Simone Wan Moran, a licensed acupuncturist. (Tr. 12/6/17 at 124; App. at A293.) She testified that an acupuncturist must assess whether the lamp is sturdy and stabilized prior to each patient. (*Id.* at 133; Tr. 12/12/17 at 104; App. at A133.) She responded affirmatively when asked whether an acupuncturist should check the tension of the lamp by moving the heads up and down and by gently shaking to see whether the heads moved. (Tr. 12/12/17 at 105-06; App. at A315-A316.) If the lamp lowers, the acupuncturist should not use the lamp. (*Id.* at 107; App. at A317.) She indicated that if Dr. Wang had performed a test on the lamp and it failed, the standard of care required him to remove the lamp from service. (*Id.* at 132; App. at A318.)

Moran further testified that testing the lamp only at the beginning of the day was insufficient because when the lamps were moved, they tend to fall even between patients. (*Id.* at 132-33; App. at A318-A319.) Accordingly, she testified that by failing to test the lamp before using it on the Plaintiff, Dr. Wang violated the standard of care. (*Id.* at 133-34; App. at A319-A320.) Moran did not, however, offer an opinion as to whether this purported breach of the standard of care caused the Plaintiff's injury.

The Center offered the testimony of Jennifer Brett, the director of the Acupuncture Institute of the University of Bridgeport, who opined on the standard of care applicable here. (Tr. 12/14/17 at 72; App. at A341.) She testified that Dr. Wang met the standard of care because "he did what any reasonable acupuncturist would do with this equipment." (*Id.* at 83; App. at A343.) She explained that he regularly checked the lamp for defects, ensured that it did not move during use, and placed it at a proper distance from the Plaintiff. (*Id.* at

88; App. at A344.) She further stated that it was not necessary to check for stability before each patient when the lamp is being used in the same place. (*Id.* at 89; App. at A345.) If the lamp is moved only slightly, then only a visual inspection is required. (*Id.* at 158; App. at A349.) Brett agreed that defective lamps should not be used. (*Id.* at 146; App. at A146.)

At the conclusion of the Plaintiff's case, the Defendants moved for directed verdict. (Tr. 12/13/17 at 161, 178, 195; App. at A322, A323, A327.) The Center argued that there was no expert testimony to support a finding of causation by the jury. (*Id.* at 178-80; App. at A323-A325.) Specifically, the Center asserted that the Plaintiff failed to adduce evidence of a defect that an additional inspection by Dr. Wang would have revealed. (*Id.* at 179; App. at A324.) The Center further argued that expert testimony was required to establish causation. (*Id.* at 179-80; App. at A324-A325.) In response, the Plaintiff pointed to Moran's testimony on the standard of care and Dr. Vallee's testimony that the tendency to lower would be apparent to a reasonable user as supporting causation. (*Id.* at 185; App. at A185.)

Dr. Wang joined the Center's motion for directed verdict. (*Id.* at 195-96; App. at A327-A328.) Dr. Wang noted that the Plaintiff disclosed Moran on the standard of care and did not offer her as an expert on causation. (*Id.* at 197; App. at A329.) Dr. Wang further argued that the Plaintiff failed to remove causation from the realm of speculation and that expert testimony was required. (*Id.* at 199-200; App. at A331-A332.) The gap in the evidence was problematic because there was no evidence as to how the lamp lowered to rest on the Plaintiff's toe. (*Id.* at 201; App. at A333.) Indeed, the Plaintiff testified that she had not moved her foot after Dr. Wang left the room. (Tr. 12/7/17 at 194-95; App. at A311-A312.) The court reserved decision. (Tr. 12/13/17 at 210; App. at A338.)

As to the jury instructions, Dr. Wang submitted a request to charge that stated, inter alia, "As against both the Center and Dr. Wang, proximate cause must be proven by expert testimony." (Wang Req. to Charge at 12; App. at A129.) The court did not include this instruction in its charge to the jury but instead instructed the jury that expert testimony was necessary to establish causation "unless the causative link can be discerned by a lay person."

(Tr. 12/20/17 at 14-18; App. at A351-A355.) Dr. Wang excepted to the charge for failing to include the instruction that proof of causation required expert testimony. (*Id.* at 40; App. at A357.)

As noted, the jury returned verdicts for the Plaintiff. After the court accepted the verdicts, the Defendants filed post-verdict motions reasserting the claims they made in their motions for directed verdict. (See Wang Mot. Set Aside, 12/22/17; App. at A141.) The trial court denied the motions by written decision on January 3, 2019. (MOD. 1/3/19; App. at A145.) The Defendants timely appealed. Additional facts will be discussed when necessary.

ARGUMENT

I. THE COURT SHOULD HAVE DISMISSED THE ACTION.

Because a failure to attach a proper opinion letter to a complaint alleging medical malpractice constitutes defective service, such failure implicates the court's exercise of personal jurisdiction over the defendant. Where a defendant timely moves to dismiss on this basis, the court is required to dismiss the action. Moreover, while a plaintiff can cure a defective opinion letter by amending her complaint, she must do so within in the statute of limitations. Because the Plaintiff here failed to move to amend her complaint within the statute of limitations, the court should have dismissed the complaint as to Dr. Wang and the Center.

A. Standard of Review

This Court affords plenary review to a decision on a motion to dismiss, viewing the allegations in the complaint in the light most favorable to the pleader. *Peters v. United Community & Family Services, Inc.*, 182 Conn. App. 688, 699-700 (2018).

B. The Plaintiff's Attempt to Cure the Defect in Her Complaint Was Untimely.

In the 1986, the legislature adopted General Statutes § 52-190a to deter frivolous malpractice actions. *Peters*, 182 Conn. at 689. Section 52-190a provides, in pertinent part:

> (a) . . . . The complaint, initial pleading or apportionment complaint shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant. *To show the existence of such good faith, the claimant or the claimant's attorney, and any apportionment complainant or the apportionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c,* which similar health care provider shall be selected pursuant to the provisions of said section, *that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion.* . . . The claimant or the claimant's attorney, and any apportionment complainant or apportionment complainant's attorney, shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate. . . .
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> . . . .
>
> c) The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action.

(Emphasis added.)

The failure to attach the good-faith certificate with a proper opinion letter to the complaint constitutes defective service of process and deprives the court of personal jurisdiction over the defendant. *Morgan v. Hartford Hospital*, 301 Conn. 388, 389 (2011) ("written opinion letter, prepared in accordance with the dictates of § 52-190a, like the good faith certificate, is akin to a pleading that must be attached to the complaint in order to commence properly the action"); see *id.* at 402 ("failure to attach a proper written opinion letter pursuant to § 52-190a constitutes insufficient service of process"); *Ugalde v. Saint Mary's Hospital, Inc.*, 182 Conn. App. 1, 10 (insufficient service of process implicates personal jurisdiction), cert. denied, 330 Conn. 928 (2018).

Where the plaintiff fails to include a proper opinion letter, the court is required to grant a timely motion to dismiss. *Bennett v. New Milford Hospital, Inc.*, 300 Conn. 1, 29 (2011). Dismissal is without prejudice and subject to the accidental failure of suit act, General Statutes § 52-592. *Bennett*, 300 Conn. at 30-31; but see *Santorso v. Bristol Hospital*, 308 Conn. 338, 358 (2013) (failure to attach a proper opinion letter is a "matter of form" pursuant to § 52-592 when it results from "mistake, inadvertence or excusable neglect, rather than egregious conduct or gross negligence on the part of the plaintiff or [her] attorney") (citations,

emphasis, and internal quotations marks omitted).

Although the Supreme Court has not addressed whether a defective opinion letter is amendable, see *Bennett*, 300 Conn. at 30 n.17, this Court has concluded that the complaint may be amended as of right within thirty days of the return date and subject to the court's discretion thereafter as long as the amendment occurs within the statute of limitations. *Gonzales v. Langdon*, 161 Conn. App. 497, 517-19 (2015).

Two recent cases from this Court make clear that any such amendments must occur prior to the expiration of the statute of limitations. *Peters*, 182 Conn. App. at 706; *Ugalde*, 182 Conn. App. at 12-13. In *Peters*, the plaintiff attached an opinion letter to his complaint that failed to indicate that the author was board certified in the same specialty as the defendant. 182 Conn. App. at 690. Because the plaintiff's attempt to correct the letter to add the pertinent information occurred after the statute of limitations had run, the trial court "was obligated to grant the defendant's motion and dismiss the action." *Id.* at 699. The opinion letter in *Ugalde* suffered from the same defect in that the author's professional qualifications were not included in the letter. 182 Conn. App. at 4. The trial court in *Ugalde* therefore properly denied the request to amend the complaint and dismissed the claim against the hospital. *Id.* at 13.

Here, the Plaintiff's injury occurred on April 22, 2010. (Br. at 2.) Pursuant to General Statutes § 52-584, the two-year statute of limitations ran on April 22, 2012, which was two days prior to the return date for her complaint. Unlike *Peters* and *Ugalde*, in which the plaintiffs attached opinion letters, albeit defective ones, to their complaint, the Plaintiff here provided no opinion letter whatsoever with her complaint. (*Id.*) If the inadvertent failure to include the author's qualifications is enough to deprive the court of personal jurisdiction, it follows that the failure to include *any* letter similarly deprives the court of personal jurisdiction over the Defendants. Accordingly, as in *Peters* and *Ugalde*, the court was required to grant the Defendants' motions and dismiss the matter since the attempted correction took place after the statute of limitations ran.

The trial court here acknowledged *Peters* and other authority that required curative action prior to the expiration of the statute of limitations but noted that this authority seemed contrary to the "recent" trend "favoring corrective action over dismissal," citing *Kortner v. Martise*, 312 Conn. 1 (2014), and *Fairfield Merrittview Ltd. Partnership v. Norwalk*, 320 Conn. 535 (2016) (MOD, 1/3/19, at 15-17; App. at A159-A161.) Both *Kortner* and *Fairfield Merrittview* involved invocations of General Statutes § 52-109, which provides for substitution of a proper party when the wrong party is named in an action. *Kortner* cited decisional law from the 1800s holding that the statute permitted substitution even after the statute of limitations had run. 312 Conn. at 13-14. The decisional law pertaining to § 52-109 and its predecessors sheds little light on resolution of the claim here.

In the context of defective process, however, decisional law has not been as lenient in curing defects through amending the complaint. See, e.g., *Hillman v. Greenwich*, 217 Conn. 520, 526-27 (1991) (amended complaint did not cure jurisdictional defect in original complaint, which lacked a writ of summons); *New England Road, Inc. v. Planning & Zoning Commission*, 308 Conn. 180, 191-92 (2014) ("failure to serve a summons or citation is a substantive defect that is not amendable pursuant to § 52-72"). The reason for treating the opinion letter as a matter of process appears to be twofold. First, strict compliance furthers the goal of weeding out frivolous medical malpractice actions. Second, the accidental failure of suit statute provides plaintiffs who have made inadvertent errors a means of getting back into court. Thus, where plaintiffs cannot take corrective action in the original lawsuit because the statute of limitations has run, they are not foreclosed from relief through a subsequent action if they can demonstrate the failure of their first action was due to inadvertence.

The trial court next questioned whether the "hard" deadline, i.e., the statute of limitations, could be harmonized with the reasoning of *Votre v. County Obstetrics & Gynecology Group, P.C.*, 113 Conn. App. 569, cert. denied, 292 Conn. 911 (2009), which suggested in dicta that a court may have discretion to permit amendment to a complaint to cure a defective opinion letter but did not discuss the statute of limitations. (MOD, 1/3/19, at 17; App. at

A161.) But in *Gonzales*, this Court held that the suggestion put forth in *Votre* was dicta because whether a complaint could be amended to cure a defective opinion letter was not before the court in *Votre*. *Gonzales*, 161 Conn. App. at 512. Indeed, in *Votre*, the plaintiff failed to attach an opinion letter to her complaint and had not sought to amend her complaint. 113 Conn. App. at 574, 584. It is difficult to see how *Peters* needed to be harmonized with *Votre*'s reasoning when the statute of limitations was not part of the discussion in *Votre*.

The trial court then distinguished *Peters* and *Gonzales* by observing that those cases involved correcting defects in letters that had been attached to the complaints but did not address "the pure inadvertence of a failure to attach an existing sufficient letter." (MOD, 1/3/19, at 18; App. at A162.) This is a distinction without a difference for purposes of compliance with § 52-190a as in both situations the plaintiff has not provided the requisite opinion letter at the time the complaint was served and filed. Presumably, where the letter failed to state the qualifications of the author, as in *Peters*, those qualifications, like the opinion letter here, existed but were not articulated. Moreover, this was a self-created hardship in that the Plaintiff waited until the statute of limitations had almost run and then chose a return date after the statute did run, which precluded her from curing her own error.

Finally, the trial court reasoned in essence that because *Gonzales* was decided before the trial in this case, judicial economy was defeated because the Defendants did not assert *Gonzales* when it was hot off the presses. According to the court, it would be "inequitable and highly wasteful to reverse the earlier decisions in such a belated fashion." (MOD, 1/3/19, at 19; App. at A163.) It is true that claims regarding personal jurisdiction are waivable where a defendant fails to move for dismissal within thirty days pursuant to Practice Book § 10-30. *Morgan*, 301 Conn. at 403-04. But that is not the case here as Dr. Wang joined the Center's motion to dismiss within the time frame allowed. Thus, the issue was timely raised.

As to the assertion that the Dr. Wang and the Center should have done something when this Court released *Gonzales*, strictly speaking, to the extent that *Gonzales* discussed the need to amend the complaint within the statute of limitations, that discussion was dicta

as the attempted amendment in that case occurred before the statute ran. 161 Conn. App. at 501-02. Thus, while *Gonzales* provided an additional argument to Dr. Wang and the Center, it was not controlling. *Peters*, however, is squarely on point and controlling.

More important, as noted the motion to dismiss preserved the claim as to jurisdiction, and *Peters* and *Gonzales* merely explained what § 52-190a meant from its enactment.

> [A] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction. . . . [Thus], when [a] court construes a statute, it is explaining its understanding of what the statute meant continuously since the date when it became law.

State v. Courchesne, 296 Conn. 622, 728 (2010) (citations and internal quotation marks omitted). Thus, Judge Karazin should have granted the motion to dismiss in 2012 because the statute has always required that corrective action take place prior to the running of the statute of limitations. Accordingly, even if Dr. Wang and the Center had not sought to bring controlling authority to the trial court's attention once it was released, they would still be entitled to a proper application of the law as it has always existed. Specifically, they would be entitled to reversal of the judgment with direction to grant the motion to dismiss. Accordingly, there is nothing "inequitable" about applying the law now. To the extent that judicial resources were wasted, the court should not have denied their motions to dismiss in the first place.

Because the Plaintiff failed to attach a proper opinion letter to her complaint and because her attempt to cure this error occurred after the statute of limitations ran, the trial court was required to dismiss the matter. The failure to do so requires reversal.

II. THE COURT SHOULD HAVE HELD AN EVIDENTIARY HEARING.

Even if the Plaintiff could cure her defective process through an amended complaint after the running of the statute of limitations, Dr. Wang and the Center disputed the veracity of her affidavit and the documents she submitted. An evidentiary hearing was required prior to allowing the Plaintiff to cure her error and establish personal jurisdiction over Dr. Wang and the Center.

A. **Standard of Review**

Trial court decisions pertaining to jurisdiction receive plenary review on appeal. *Peters*, 182 Conn. App. at 699-700.

B. **The Court Improperly Denied the Defendants' Request for an Evidentiary Hearing.**

The Plaintiff's amended complaint attempted to cure the jurisdictional defect of her original complaint by adding the opinion letter she claims existed at the time she originally filed her complaint. As the amended complaint pertains to the court's jurisdiction, decisional law addressing the establishment of jurisdiction controls. The state of the record at the time the jurisdictional issue is raised determines what the court considers when deciding the question. *Angersola v. Radiologic Associates*, 330 Conn. 251, 274 (2018).

A party may establish jurisdiction based on "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts . . . ." *Id.* (citations and internal quotation marks omitted). Significantly, "[when] a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts." *Id.* at 275 (citations and internal quotations omitted). Put another way, "[w]hen issues of fact are necessary to the determination of a court's jurisdiction, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses." *Standard Tallow Corp. v. Jowdy*, 190 Conn. 48, 56 (1983).

Here, the Plaintiff attached an affidavit by her counsel along with an undated opinion letter, a letter from a paralegal to an unnamed health-care professional,[8] and an email from an unnamed sender in which the subject line was "Opinion letter- Kissel." (Amend. Compl.,

[8] Section 52-190a requires that the name of the author of the opinion letter be expunged.

Exhs. 1-3; App. at A45-A51.) Plaintiff's counsel claimed that these documents demonstrated that the opinion letter existed prior to filing the complaint and that the letter was omitted through inadvertence. (Req. to Am. Compl., Ex. B at 2; App. at A43.) In both their reply to the Plaintiff's objection to the motion to dismiss and their objection to the Plaintiff's request to amend, the Defendants disputed these assertions. For example, Plaintiff's counsel, who signed the affidavit, did not write to the health-care professional, an RN/paralegal did. The health care professional is then directed to send the letter to another lawyer in Plaintiff's counsel's office, who did not submit an affidavit. (Obj., 7/9/12, at 4; App. at A55.)

Judge Karazin rejected the Defendants' request for an evidentiary hearing because the Defendants did not submit their own evidence to rebut the affidavit submitted by Plaintiff's counsel. (MOD, 9/6/12, at 10; App. at A69.) See *Weihing v. Dodsworth*, 100 Conn. App. 29, 39 (2007) (plaintiff failed to offer evidence to rebut defendant's affidavit concerning his presence in Connecticut for court procedure). But the evidence the Defendants would have proffered was cross examination of any witnesses the Plaintiff called, to challenge the credibility of them and the affiant because of the undated letter and correspondence pertaining to it.

Appellate tribunals defer to fact finders on matters of credibility in part because of the non-verbal aspects of a witnesses' testimony such as demeanor, tone of voice, and body language that a written document such as a transcript, or here an affidavit, cannot capture. *Commission on Human Rights & Opportunities v. Sullivan*, 285 Conn. 208, 233 (2008) ("Credibility must be assessed . . . not by the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude.") (citation and internal quotation marks omitted). In light of the patent defects in the evidence the Plaintiff submitted, the Defendants had a right to cross examine the affiant as to the circumstances of these documents to determine their credibility in light of all the non-verbal communication that does not exist in affidavits.

Whether the opinion letter existed at the time the complaint was filed was a critical material fact. Where critical material facts are in controversy, an evidentiary hearing is required. *Design for Health, Inc. v. Miller*, 187 Conn. App. 1, 9 (2019) (hearing needed to

determine whether defendant signed contract providing for litigation in Connecticut); *Caron v. Connecticut Pathology Group, P.C.*, 187 Conn. App. 555, 563 n.6 (hearing required when genuine factual issue exists in deciding motion to dismiss), cert. denied, 331 Conn. 922 (2019). The court should have granted the Defendants' request for an evidentiary hearing.

III. THERE WAS INSUFFICIENT EVIDENCE OF CAUSATION.

The Plaintiff presented no testimony by an expert witness to explain within a reasonable probability that Dr. Wang's failure to inspect the lamp prior to using it on the Plaintiff would have prevented her injury. The mechanics of the lamp are beyond the understanding of a layperson, and the evidence was not so strong that the jury could determine causation without resort to speculation. Accordingly, the judgment should be reversed with direction to grant the motions for directed verdict filed by Dr. Wang and the Center.

A. **Standard of Review**

The standard of review applicable to rulings on motions for directed verdict or judgment notwithstanding the verdict are well settled:

> Directed verdicts are not favored. . . . A trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion. . . . In reviewing the trial court's decision [to deny a motion for directed verdict] we must consider the evidence in the light most favorable to the plaintiff. . . . Although it is the jury's right to draw logical deductions and make reasonable inferences from the facts proven . . . it may not resort to mere conjecture and speculation. . . . A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party. . . . A directed verdict is properly rendered when expert testimony is necessary to prove a plaintiff's claim and the plaintiff has failed to produce such expert testimony.

Bagley v. Adel Wiggins Group, 327 Conn. 89, 102 (2017) (citations and internal quotation marks omitted).

B. **The Plaintiff Did Not Provide Expert Testimony on Causation.**

Expert testimony is normally required to prove causation in a medical malpractice

action. See *Sherman v. Bristol Hospital, Inc.*, 79 Conn. App. 78, 88 (2003) ("Expert medical opinion evidence is generally required in all cases involving professional competence and malpractice.") (citation and internal quotation marks omitted). The expert must establish a causal relationship between the purported breach and the plaintiff's injury by a reasonable probability. *DiNapoli v. Regenstein*, 175 Conn. App. 383, 401 n.14 (2017). The expert may do so through direct opinion, by process of eliminating other causes, or through a response to a hypothetical question but need not use talismanic language to show a reasonable probability of causation. *Id.*

Expert testimony is not necessary where the condition is "obvious or common in everyday life," where the evidence of injury "creates a probability so strong that a lay jury can form a reasonable belief," or where "the professional negligence is so gross as to be clear even to a lay person." *Sherman*, 79 Conn. App. at 89 (citations and internal quotation marks omitted); see also *Shegog v. Zabrecky*, 36 Conn. App. 737, 746-47, cert. denied, 232 Conn. 922 (1995).

Here, to establish liability as to Dr. Wang, the Plaintiff had to show that his purported breach[9] of the standard of care caused her injury. Specifically, she had to show that inspecting the lamp prior to its use on the Plaintiff would have prevented the injury. The Plaintiff failed to present expert testimony to prove this crucial nexus.

It is true that Moran testified that an acupuncturist should inspect the lamp prior to use on each patient. (Br. at 8.) But she was not offered as an expert on causation and did not explain how this purported breach caused the Plaintiff's injury. Victor Popp did testify that the defective design of the lamp (i.e., lack of a guard and locking mechanism) caused the Plaintiff's injuries, but he never stated (because he was never asked) that there was a reasonable probability that Dr. Wang's failure to inspect prior to using it on the Plaintiff would

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[9] Although Dr. Wang does not challenge the sufficiency of the evidence as to his purported breach of the standard of care on appeal, he does not concede that he was negligent. Should there be another trial, another jury may well find that he acted reasonably under the circumstances.

have prevented the injury from occurring. (Br. at 7.) Glenn Vallee testified that an outside force was required to move the lamp head and that a constant force was necessary to move it twelve inches. (*Id.*) Vallee did not explain how inspecting the lamp prior to using it on the Plaintiff would have prevented the injury.

The lack of such testimony showing the nexus between the breach of the standard of care and the injury has been fatal in other cases involving professional malpractice. For example, in *DiNapoli*, the expert there never testified as to the causal relationship between the teeth whitener her dentist used and the injuries she claimed she sustained, thereby failing to prove causation. 175 Conn. App. at 401 n.14. This was so even though the plaintiff's pain began with the treatment. *Id.*

In *Kuehl v. Koskoff*, 182 Conn. App. 505, 522, cert. denied, 330 Conn. 919 (2018), the court observed that expert testimony was necessary in a legal malpractice action "to keep the jury from speculating on how the client's loss or injury is directly linked to that which he claims was the breach of duty by the attorney." In *Kuehl*, the court also applied the rule requiring expert testimony as to causation, observing that the plaintiff's expert described various failings by the defendant but never testified that these failures caused her damages. *Id.* at 522-23.

Because the mechanics of the lamp's operation is not within the knowledge of the average juror, expert testimony was necessary to establish the link between the failure to inspect prior to use on the Plaintiff and her injuries. As a general rule, expert testimony "is required when the question involved goes beyond the field of ordinary knowledge and experience of the trier of fact." *Bagley*, 327 Conn. at 103 (citations and internal quotation marks omitted). In *Bagley*, the jury found that the plaintiff's decedent's exposure to asbestos caused the mesothelioma that killed him. *Id.* at 92-93, 98. Her decedent had been exposed to dust from an epoxy that contained asbestos. *Id.* at 92-93. The court held that because the epoxy was a complex product, expert testimony was required to prove that grinding it would produce respirable asbestos. *Id.* at 103-04. Proving that fact was necessary to establish causation.

Id. at 104. The failure to adduce such expert testimony required reversal of the verdict in *Bagley*.

Here, Dr. Wang testified that he inspected the lamp for stability each day and that he did so on the morning of April 22, 2010. (Tr. 11/28/17 at 132; Tr. 11/29/17 at 162; App. at A251, A256.) Given the complexity of the mechanics of the lamp, expert testimony was necessary to show how a subsequent inspection the same day would reveal the tendency to fall far enough to reach the Plaintiff's toe. This is especially so where the Plaintiff's expert testified that a complicated inspection involving weights and measurements would be necessary to observe that the lamp was lowering. (Br. at 5-6.)

Although an exception to the need for expert testimony exists where the evidence is so strong that the jury can reasonably form a belief as to what happened, that was not the case here. First, both engineers testified that the lamp would not fall without some force acting upon it. (Br. at 5, 7.) There was no testimony that either the Plaintiff or Dr. Wang did anything to the lamp that would amount to the excitation or force necessary to move the lamp. Indeed, the Plaintiff testified that she did not move at all. While the jury is free to reject testimony, it cannot infer the opposite from such rejected testimony. *Masse v. Perez*, 139 Conn. App. 794, 280 (2012) ("[I]t is axiomatic under Connecticut law that, while a [trier of fact] may reject a defendant's testimony, a [trier of fact] in rejecting such testimony cannot conclude that the opposite is true.") (citation and internal quotation marks omitted), cert. denied, 308 Conn. 905 (2013). Thus, the jury would have to speculate as to what outside force acted on the lamp to cause it to lower.

Popp also testified that by pulling the head of an exemplar lamp that was a different make and model from the lamp at issue here all the way up, he got the lamp to drop nine inches, sufficient to reach the Plaintiff's foot if the table was 36 inches high, and that by jiggling it twenty times or so in six to seven seconds, the lamp descended to two inches above

where the Plaintiff's foot would be, assuming the table was 36 inches high.[10] (Br. at 6-7.) To use this evidence to conclude that an inspection would have prevented the injuries again requires the jury to speculate.

Specifically, the jury would first have to speculate that the exemplar lamp on which these tests were performed was sufficiently similar to the lamp at issue, even though it was a different make and model and even though Popp testified he disregarded most of what he learned from the exemplar. Next, the jury would have had to speculate that Dr. Wang pulled the lamp head all the way up or jiggled the lamp as Popp did, but there is no evidence of either of these acts. More important, Popp never testified that bumping the lamp accidently was equivalent to the one and a quarter pounds of force he stated was necessary to move the lamp head onto the Plaintiff's foot, or that jiggling the lamp would have caused the lamp head to reach the Plaintiff's foot.

Thus, even trying to infer causation from Popp's testimony – when he did not opine as to whether Dr. Wang's purported negligence caused the injury – was not possible on this record. Accordingly, the jury would have to conclude that the lamp descended spontaneously, i.e., without the exertion of another force upon it – which is contrary to the expert testimony – or the jury had to infer that the lamp was bumped by someone, for which there was no the evidence.

As to the whether the lamp descended spontaneously – which the Plaintiff's expert said was "impossible" – the only evidence was Dr. Wang's withdrawn amended third-party complaint against Wabbo where Dr. Wang alleged the lamp descended spontaneously. While decisional law permits the jury to consider this allegation as an evidentiary admission, the statement is not conclusive on the fact-finder. *Nationwide Mutual Ins. Co. v. Allen*, 83 Conn. App. 526, 542, cert. denied, 271 Conn. 907 (2004). For the jury to conclude that this

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[10] If the table was only 30 inches high, the lamp would not have reached the Plaintiff's toe under either test. (Br. at 5.) Popp assumed the table was 30 or 36 inches high based on his recollection of Dr. Wang's deposition testimony. (Tr. 12/1/17 at 145; App. at A273.)

allegation proved causation, the jury would have to infer that an inspection prior to using the lamp on the Plaintiff would have revealed noticeable looseness that the earlier inspection that day did not and that Dr. Wang would not have used the lamp. Given the contrary evidence by the experts and that this theory relies on a withdrawn allegation (which was not made by an expert), it cannot be said that the evidence was so strong that expert testimony was not necessary.

Decisional law delineates the strength of the evidence necessary to dispense with expert testimony as to causation. In *Shegog*, the plaintiff's decedent died of liver failure after taking two protein compounds on the advice of the defendant. 36 Conn. App. at 739-740. The defendant claimed there was insufficient evidence of causation because his treating physicians assumed that the drugs caused the liver failure without toxicological analysis of the drugs. *Id.* at 747. But all the physicians reached the conclusion that the drugs caused his liver failure by eliminating all other possible causes. *Id.* at 748-50. Further, the defendant's expert testified that liver's reaction time to foreign substances is six weeks, and the plaintiff's decedent died six weeks after starting the drugs. *Id.* at 750. Taken together, that evidence was sufficiently strong that testimony regarding the drug's effect on the liver was not necessary.

On the other hand, in *DiNapoli*, the Appellate Court concluded that the failure to provide expert testimony on causation was an alternate basis to affirm, inter alia, because the evidence was not so strong that the teeth whitening procedure caused pain and tooth sensitivity for four years as well as hair loss. 175 Conn. App. at 386-87, 401 n.14. The evidence was that during the procedure she experienced extreme pain that did not subside. *Id.* at 386. But this was not enough to demonstrate causation despite the fact that the intense pain began with the procedure at issue. See also *Poulin v. Yasner*, 64 Conn. App. 730, 749, cert. denied, 258 Conn. 911 (2001) (plaintiff failed to show that his pancreatitis was caused by defendant's failure to tell the plaintiff to stop drinking because expert testimony was required to show that cessation of alcohol use would have prevented pancreatitis).

Unlike *Shegog*, where all the evidence pointed strongly to causation, the evidence as to how the lamp descended was non-existent but for a withdrawn allegation that is contradicted by the expert testimony. Like *DiNapoli* and *Poulin*, the Plaintiff here failed to provide expert testimony to show causation, which was necessary in light of the weakness of the evidence.

In denying the Defendants' motions to set aside the verdict, the trial court reasoned that because the lamp deteriorated over time, the looseness should have been apparent, and that an inspection prior to use on the Plaintiff would have served as a backup to an inadequate inspection earlier in the day. (MOD, 1/3/19, at 34; App. at A178.) The court stated:

> All that is necessary for proximate cause is to establish that the conduct of the defendant was a substantial factor in the lamp coming into contact with the plaintiff's foot, and the plaintiff has established that linkage, by direct and circumstantial evidence.

(*Id.*) But none of that evidence includes expert testimony that an inspection of the lamp prior to use on the Plaintiff would have prevented the injury.

The court concluded its analysis by questioning whether expert testimony was necessary "to explain to a jury that an unstable heating device, in proximity to a prone individual, can and will cause injury if that instability results in direct contact of the hot surface and the prone individual's body?" (MOD, 1/3/19, at 35; App. at A179.) But that is not the causal piece that is missing. Just as expert testimony was necessary in *Bagley* to explain that grinding an adhesive containing asbestos would turn it into a respirable form, the Plaintiff here had to show by expert testimony that if Dr. Wang had performed an inspection immediately prior to using the lamp, there was a reasonable probability that he would have discovered the deterioration of the lamp and taken it out of service. This the Plaintiff did not do.

The Plaintiff failed to establish causation through expert testimony; therefore, the court should have directed judgment for Dr. Wang and the Center.

IV. THE COURT COMMITTED INSTRUCTIONAL ERROR.

As the need for expert testimony is a question of law, the trial court erred in submitting the question to the jury. The weakness of the evidence meant this error was harmful.

A. Standard of Review

The standard of review applicable to claims of instructional error is well settled.

> [J]ury instructions must be read as a whole and . . . are not to be judged in artificial isolation from the overall charge. . . . The whole charge must be considered from the standpoint of its effect on the jurors in guiding them to a proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . The instruction must be adapted to the issues and may not mislead the jury but should reasonably guide it in reaching a verdict. . . .
>
> . . . . The test of a court's charge is not whether it is accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Therefore, the jury instructions need not be exhaustive, perfect, or technically accurate. Nonetheless, the trial court must correctly adapt the law to the case in question and must provide the jury with sufficient guidance in reaching a correct verdict.

Burke v. Mesniaeff, 177 Conn. App. 824, 831-32 (2017) (citations and internal quotation marks omitted), cert. granted, 328 Conn. 901 (2018).

B. Additional Facts

Near the end of trial, Dr. Wang filed a request to charge in response to the draft charge the court had provided. (Tr. 12/14/17 at 2; App. at A340.) Specifically, Dr. Wang edited the draft and provided a redlined version and a clean version.[11] (*Id.*)

Regarding proximate cause, Dr. Wang's proposed charge stated, in pertinent part:

> If you decide that the Center committed malpractice (was negligent/violated the standard of care) in accordance with these instructions, and the plaintiff's claimed injury would not have occurred if not for the Center's negligence, then you must determine whether the plaintiff has proven for the Center's negligence, then you must determine whether the plaintiff has proven by a fair preponderance of the evidence that the Center's negligence was a proximate cause of the plaintiff's claimed damages. Similarly, if you decide that Dr. Wang committed malpractice (was negligent/violated

[11] The court had no issue with this procedure. (*Id.*)

the standard of care), and that that the plaintiff's claimed injury would not have occurred if not for his negligence, then you must determine whether the plaintiff has proven by a fair preponderance of the evidence that Dr. Wang's negligence was a proximate cause of the plaintiff's claimed damages. . . .

As against for the Center and Dr. Wang, proximate cause must be proven by expert testimony.

. . . .

As to both the Center and Dr. Wang in this case, you must ask yourselves whether each defendant was, in fact, negligent. If you find that one or both of these defendants was negligent then you must determine whether that negligence was a substantial factor in causing the injuries plaintiff complains of. . . .

As applied to this case, if the plaintiff proves by a preponderance of the evidence *through expert testimony* that the Center was negligent, and that such negligence contributed materially and not just in a trivial or inconsequential manner to the production of the injury, then the Center's negligence was a proximate cause of the plaintiff's injuries. Similarly, if the plaintiff proves by a preponderance of the evidence *through expert testimony* that Dr. Wang's negligence contributed materially and not just in a trivial or inconsequential manner to the production of the injury, then his negligence was a proximate cause of the plaintiff's injuries.

(Wang Req. to Charge, 12/14/17, at 11-13 (emphasis added); App. at A128-A130.)

The court charged the jury as follows, in pertinent part:

In order to recover from a defendant, plaintiff must prove that the defendant's conduct was, in fact, a proximate cause of the injuries sustained by the plaintiff. With respect to the malpractice claim, the proof generally *must be based on expert testimony, unless the causative link can be discerned by a layperson without the need of expert assistance.*

. . . .

Proximate cause means that there must be a sufficient causal connection between the act or omission alleged and any injury or damage sustained by the plaintiff. An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing the injury. That is, if the injury or damage was a direct result or [sic] a reasonable probable consequence of defendant's act or omission, it was proximately caused by such act or omission. In other words, if an act had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act or omission is a proximate cause.

In order to recover damages for any injury, plaintiff must show by a preponderance of the evidence that such injury would not have occurred without the defendant's alleged misconduct. If you find that the plaintiff complains about an injury which would have occurred even in the absence of defendant's conduct, or that defendant's conduct is not causally connected to the incident, you must find that the defendant did not proximately cause that injury.

. . . .

(Tr. 12/20/17 at 14-16 (emphasis added); App. at A351-A353.)

Dr. Wang's counsel excepted to the charge stating: "So I requested that at page 15 [of the redlined version] there would be an instruction that in this case the plaintiff must prove proximate cause through expert testimony and in this case that would be the standard

applicable to an acupuncturist." (*Id.* at 40; App. at A357.) The Center joined Dr. Wang's comments on this point. (*Id.* at 41; App. at A358.) The trial court rejected the claim on the ground that its instruction that expert testimony was necessary "unless the causative link is sufficiently obvious to a lay person that expert testimony is not required" was a proper statement of the law and supported by the evidence. (MOD, 1/3/19, at 34-35; App. at A178-A179.)

C. **The Jury Instruction Was Improper.**

While the trial court correctly stated that exceptions to the requirement of expert testimony on causation exist, see *Shegog*, 36 Conn. App. at 746-47, whether expert testimony is necessary in any given case is a question of law. See *Bagley*, 327 Conn. at 103 (2017). Thus, the court should decide in the first instance whether the evidence is so strong that causation is obvious to a layperson. Here, however, the court improperly delegated that task to the jury.

The purpose of requiring expert testimony is to prevent the jury from speculating as to causation when causation involves matters beyond the ken of the ordinary person. See *Keuhl*, 182 Conn. App. at 522; *Williams v. Chameides*, 26 Conn. App. 818, 824, cert. denied, 221 Conn. 923 (1992). Indeed, because the court has a duty not to submit an issue to the jury that is not supported by the evidence, jury instructions should be limited to those theories where there is evidence to support them. *Farmer-Lanctot v. Shand*, 184 Conn. App. 249, 256 (2018) (trial court properly declined request to charge where evidence did not support it). By instructing the jury that expert testimony was required unless the issue was within ordinary understanding, the court delegated its gatekeeping responsibility to the jury, which had to decide, as a matter of law, whether the mechanics of the lamp was within their understanding as laypersons.

Moreover, as applied here, the court's instruction is *not* an accurate statement of the law because the evidence was not so strong as to obviate the need for expert testimony.

(See *supra* Part III.) Although jury instructions need not be perfect, they do need to be adapted to the law to the facts of the case. *Burke*,177 Conn. App. at 832. Because the evidence pertaining to causation was not so strong as to dispense with the need for expert testimony, the court should have instructed the jury as Dr. Wang requested.

The party claiming error bears the burden of showing harm, which occurs if it is likely that the instructional error affected the verdict. *MacDermid, Inc. v. Leonetti*, 328 Conn. 726, 749 (2018). Here, the instruction was harmful because it permitted the jury to ignore the expert testimony. Popp testified that the wear would start slowly and would not be deceptive and "maybe not observable" without measuring or hanging weights on the lamp. (Br. at 5.) For wear to be observable on a daily inspection, the inspection would have to be "pretty complicated." (Br. 5-6.)

Had the jury been required to rely on expert testimony, it likely would have determined that the type of inspections Dr. Wang performed would not have revealed the wear on the lamp and that the Plaintiff failed to establish causation. There was no evidence that the standard of care was to conduct an inspection involving weights and measurements. Instead, it appears that the jury relied on the withdrawn allegation that the lamp descended spontaneously and testimony that the looseness would be noticeable without considering *how* it would be detectable (i.e., through a complicated inspection that went beyond what was required). Because the instructional error likely affected the jury's assessment of the evidence, a new trial is required.

Conclusion

Both the failure to attach an opinion letter to the complaint and the failure to establish causation through expert testimony are errors that warrant reversal with judgment directed for Dr. Wang and the Center. The instructional error requires a new trial, and the failure to provide an evidentiary hearing on the motion to dismiss requires a remand for such a hearing.

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CERTIFICATION

Pursuant to Practice Book § 67-2(g), I hereby certify that: (1) the electronically submitted brief and appendix were emailed on July 19, 2019, to counsel of record listed below; and (2) that the brief and appendix do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted.

Pursuant to Practice Book § 67-2(i), I hereby certify that: (1) in compliance with Practice Book § 62-7, a copy of the foregoing brief and appendix sent to the counsel of record listed below on July 19, 2019; (2) that the brief and appendices are true copies of the brief and appendix filed electronically pursuant to Practice Book § 67-2(g); (3) that the brief and appendix do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted; (4) and that the brief complies with all provisions of Practice Book § 67-2.

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